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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration	)))))))	PP Docket No. 93-21

COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

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Its Attorneys

March 29, 1993

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SUMMARY

The Commission's study of sports programming should be broad-based and comprehensive. This requires that the Commission analyze the economics of the relevant sports since those economics in large measure determine the broadcast-cable sports programming mix. Moreover, the Commission should recognize that the vast majority of cases which some have characterized as sports programming "siphoning" or "migration" are in reality cases of "abandonment" in which cable carries sports programming that broadcasters declined to carry.

For a variety of reasons, broadcast television chooses not to accommodate all of the sports programming rights-holders desire to sell. The broadcasters have abandoned many sports in their entirety and limited their purchases of others. Cable has picked up a large portion of this abandoned programming; giving certain sports their only television exposure and giving sports fans access to games that otherwise would not be televised.

The future of sports programming is difficult to predict because of the nature of rights negotiations and profound changes in the organization of professional football and baseball. Nonetheless, Time Warner believes that the following trends are likely:

1. Certain sports events, such as the Super Bowl and the World Series, will continue to be televised on broadcast television.

2. The current pattern of rights negotiations in which the major sports leagues and teams negotiate and reach agreement with broadcasters and only then offer excess product to cable will continue.

3. In response to a variety of economic factors, rights-holders will continue to look to a variety of media to televise sporting events.

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COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner") respectfully submits its comments in the above-captioned proceeding.[1] Time Warner is a partnership, the majority of which is indirectly owned and managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable television systems nationwide; Home Box Office, Inc. ("HBO"), which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs. Time Warner Sports, a wholly-owned subsidiary of HBO, oversees the negotiations for, and the production and distribution of, sporting events televised on HBO and TVKO, a boxing pay-per-view service launched in 1991 by HBO.

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[1] Notice of Inquiry in PP Docket No. 93-21, FCC 93-77 (rel. February 9, 1993) ("Notice").

I. Introduction

America's love of sports is nowhere more evident than in the insatiable American appetite for television sports programming. A few may nostalgically yearn for those long-gone summer nights spent anxiously following the fate of their hometown baseball team by radio. But today's vast American audience for sports programming never would forego television as the ultimate window on the drama and color of sports of all kinds -- amateur and professional.

From the 1950's, broadcast television has played the pivotal role in bringing sports programming to American households. In the 1980's, the amount of available sports programming increased greatly. While cable has begun to develop an ancillary role in sports programming, broadcasters continue to be the dominant force. The overall amount of sports programming on broadcast television increased during that period and it remains true that any sports programming which broadcasters believe it is in their economic interest to carry is in fact carried on broadcast television.

Networks, independent broadcasters and cable operators all determine their product mix based primarily on perceived economic return. All will telecast as much sports programming as is profitable for them; taking into account the amounts that can be earned televising other forms of programming.

Unlike cable programmers, however, networks and independent broadcast stations must maintain a demographically diverse viewing audience in order to maximize their advertising base and thus their economic return. As a result, they limit the amount of sports programming they bid for and carry in order to optimize their product mix. <u>These limits are self-made and self-imposed business strategies and would be in place whether or not cable television served as an outlet for sports programming the broadcasters opted not to carry</u>.

Rights-holders, seeking revenue to keep pace with escalating labor and other costs, simply cannot afford to let these limits determine the amount of programming they sell or the amount of sports televised. The excess product is too valuable a commodity. Rights-holders have garnered <u>billions</u> in additional revenue by adding cable to their portfolio. The current major cable sports programming contracts are illustrative. Over their full terms, the TNT and ESPN contracts are worth approximately \$850 million to the National Football League, the ESPN contract is worth approximately \$425 million to Major League Baseball, and the TBS contract is worth approximately \$425 million to the National Basketball Association.

With the appearance of NFL football on ESPN and the televising of local and regional baseball and basketball on cable networks, broadcasters began characterizing cable television sports programming as an issue of "sports siphoning." The issue is not "siphoning" by cable programmers, or even "migration" of sports programming. The issue more "accurately" is one of abandonment by broadcasters. Broadcasters have the ability (and are given the opportunity) to purchase as much sports programming as they desire, but they simply have chosen not to purchase all the sports programming available.

Time Warner does not use the term "abandonment" pejoratively. There is nothing wrong, either from an economic or public policy standpoint, with broadcasters choosing not to buy all of the product sports leagues and teams offer to them. And there is nothing wrong with broadcasters making a determination not to carry certain sports at all because it is not in their economic interest to do so.

Nor is it wrong, however, for cable operators and programmers to bid on and carry sports programming that broadcasters choose not to carry. To the contrary, cable carriage of such programming is very definitely in the public interest. Cable has made available to sports fans vast amounts of programming. As a general matter, cable has not taken sports programming away from broadcasters, but given to viewers sports programming broadcasters have chosen not to provide. Placing artificial limits on cable carriage of sports programming would not have the effect of ensuring more sports on broadcast television. Rather, such limits would simply reduce the overall amount of sports on television to the detriment of sports fans.

If the Commission is to present a truly accurate picture of the interplay between sports and television, it must examine not only the economics of broadcast and cable television, but the economics of each individual sport as well. For it is each sports' economics that drive <u>its</u> programming strategies and goals, and, in turn, to a very great extent determine sports programming patterns.

In addition to addressing the proper scope of the Commission's inquiry, our comments address Time Warner's appraisal of sports programming "migration" to date. As developed more fully below, our own experience and close observation of the sports programming business suggest that today cable sports programming consists largely of: (1) "niche" programming of sports that broadcasters have abandoned entirely (such as hockey and boxing); (2) regular season games in major sports (such as professional baseball and football) which broadcasters declined to include in their programming packages; and (3) sports that never were carried on an on-going basis on broadcast television (such as women's sports events, college baseball, lacrosse, and motor racing).

Because sports leagues sell programming rights on a multi-year basis and for such large amounts, the face of the sports programming business changes with each deal. Connecting the dots between individual, discrete deals may produce a trend line that describes previous deals, but does not necessarily denote a trend that is useful in predicting the shape and scope of future deals. It is likely, for instance, that the next network professional football and baseball packages will be shaped more by the previous year's ratings and the economic state of the advertising market than by the elements of the previous deal.

Although the future of sports programming is impossible to predict in a comprehensive manner, Time Warner believes that aspects of the future sports programming landscape can be glimpsed:

1. Certain sporting events, such as the Super Bowl and the World Series, will remain on broadcast television.

2. Escalating player salaries and other economic demands on sports will result in: (1) more instances of sports programming "layering" -- in which a given event is televised in different geographic areas (local, regional and national) using different media; and (2) more product being offered to broadcasters and cable.

The "layering" of sports programming will serve to maximize its distribution -- allowing a Yankees' fan in Yuma, Arizona, and a Celtics' fan in Cheyenne, Wyoming, to see their favorite teams play -- while at the same time ensuring local coverage and maximizing the economic return to the rights-holder.

The increase in product will vary by sport and occur in an number of forms, including new regular season games (as a result of longer seasons), new post-season games (as a result restructured playoff formats), and increased availability of games (as a result of staggered starting times and days). As a result of the increased supply of product, the amount of sports programming on cable will increase. The amount of sports programming on broadcast television will also increase unless broadcasters determine that their optimal product mix would be harmed by an increase in sports programming.

II. The Commission's Study Should be Broad-based and Comprehensive in Scope

A. An Analysis of the Economics of the Relevant Sports Should be an Integral Part of the Commission's Study

Section 26(a) of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to conduct a study that investigates and analyzes "trends in the migration of [sports] programming . . . including the economic causes and the economic and social consequences of such trends."[2] Sports programming involves a complex interplay of actors; only two of whom are broadcasters and cable programmers. A study which focuses exclusively on these will provide an incomplete picture

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[2] Pub L. No. 102-385, 106 Stat. 1460 (1992)(hereinafter, the "Act" or "Cable Act").

and be of little predictive value. The study therefore must include an analysis of the economics of the sports whose programming is to be studied.

If a broadcaster or cable programmer does not like the parameters set by a producer selling entertainment programming, it can choose not to purchase the product, confident that comparable programming will be available from another source. This is not the case with sports programming. Sports teams and leagues are not fungible in the same way as entertainment programming. As a result, leagues and rights-holders have more leverage with which to implement their programming strategies and goals than do other sellers of programming.

The programming strategies and goals of the major professional sports are a product of their internal organization (including the degree to which teams share revenue), the importance of gate receipts as a source of revenue, labor pressures, legal environment, and their local, regional and national popularity, among other factors. These factors are fluid; and changes in them are apt to produce changes in programming strategies and goals. By way of example, expansion produces revenue that might effect changes in a sports' programming strategies and goals. This is so because the amounts involved are so substantial: Major League Baseball recently received $180 million in franchise fees from the Florida Marlins and the Colorado Rockies and the NFL is expected to receive

$290-300 million from the next two franchises to be awarded. The Commission's study cannot fulfill the Cable Act's mandate to explore the "economic causes"[3] of the distribution of sports programming without analyzing each of these factors.

Finally, the Commission also should explore the possible effects on a sport of an artificial restriction on the amount of programming that sport is permitted to sell to cable programmers. Such a restriction obviously would reduce the revenues available to that sport. Thus the restriction may result in further escalation in ticket prices, competitive disparities as certain spectator appeal for both male and female student athletes.[4]

B. The Commission's Study Should Distinguish Between Migration and Abandonment

The Notice defines sports programming migration as "[t]he movement of sports programming from broadcast television to a subscription medium."[5] This definition may be inadequate, however, unless it contemplates a qualitative analysis of how and why the transfer of a given sport or number of games from broadcast to cable (or vice versa) took place. Under the definition quoted above, the transfer of a sport from a national broadcast package to a cable package would be an instance of "migration." Yet, such a transfer could have resulted from: (1) head-to-head bidding between a network and a cable programmer; or (2) a unilateral decision on the part of a network to drop a particular sport from its lineup (such as professional hockey) or not to seek to broadcast more than a certain number of games. These two circumstances present very different public policy issues, but the Notice's definition of migration does not distinguish between them.

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4 See Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 40-41 (1990) (hereinafter, "1990 House Hearing").

5 See Notice at ¶ 3.

The Commission should characterize the second circumstance described above as "abandonment" rather than "migration." Much more than semantics distinguishes these two terms. In many cases, broadcasters make a determination that it is uneconomical to televise certain sports because of audience size, demographics, rights fees, production costs, or other factors. The Commission should not assume that all sports programming on cable results from cable operators or programmers outbidding broadcasters. To the contrary, Time Warner believes that a large amount of the sports programming appearing on cable is a result of decisions by broadcasters not to carry such programming. In such cases, cable carriage does not reduce the amount of sports on broadcast television. Rather, it increases the overall amount of television sports available to consumers. Consumer welfare is unquestionably benefitted because without cable such sports would not be televised at all.[6]

C. The Commission's Study Should Focus on the Extent of Actual Migration Not on the Amount of Sports Programming on Cable

It is critical that any evaluation of the welfare of the consumer of sports programming must start with recognition of two central facts. First, the amount of sports programming available

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[6] Abandonment also occurs when broadcasters opt not to negotiate for the purchase of particular games or games offered during a particular time slot.

on broadcast television is much greater today than it was in 1980. Second, the amount of sports programming available on cable television is much greater today than it was in 1980.

Sports programming is not a zero sum game in which every event shown on cable is "siphoned" from "free TV." In order to promote the zero sum scenario some broadcasters conveniently ignore both the growth in the amount of sports programming <u>they</u> carry and the explosion in the number of sports events being offered for sale. Compared to 1980, the consumer of sports on television has an unprecedented cornucopia of sports viewing opportunities, both on broadcast and cable.

If cable programmers were "siphoning" sports events from broadcast TV, the evidence would be a decrease in the quantity of broadcast sports programming. But just the opposite is true. The Commission cannot ignore the most powerful evidence that "siphoning" is a fiction -- the fact that the quantity of broadcast sports programming has actually increased, rather than been drained away by cable programmers.

Time Warner supports the position the Commission enunciated in the Notice: "An increase in the number of games exhibited via subscription media . . . would not, by itself, constitute sports programming migration. To identify migration, it would be necessary to examine the number and type of games . . . that were available via broadcast television."[7] And as neutral third

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[7] <u>See</u> Notice at footnote 2.

parties have noted, "[I]n terms of coverage there is no doubt that sports programming has increased on over-the-air stations."[8]

Attached to the Notice is a letter from Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, Department of Justice, commenting on the antitrust implications of "preclusive" contracts in the distribution of sports programming. Rosen observes such contracts should b judged under the antitrust "rule of reason" and that the crucial issue is "whether such agreements have the effect of limiting the televising of sporting events or whether they serve to increase the aggregate number of sporting events shown on television." This formulation, which appears to be a variant of the output effects standard of NCAA v. Board of Regents, 468 U.S. 85 (1984), must necessarily include the combined output effects of both over-the-air and cable televised sporting events. Only if there is a reduction in the combined quantity of over-the-air and cable televised sporting events, according to this analysis, would the conduct in question be of competitive concern.

Aside from the issue of whether preclusive contracts restrict output, Time Warner submits that the mere transfer of sporting events to cable television has, at worst, a neutral effect on the aggregate output of televised sporting events since one form of television merely replaces another. Indeed, it would

[8] See Robert I. Mitchell, II, Mediology: Crying Foul; As They See It, Marketing & Media Decisions, January 1990, at 69.

appear that on a national basis the aggregate quantity has increased since some national cable networks have carried sporting events that would otherwise have been broadcast only locally. In no case has there been a reduction in the output of televised events caused by the "migration" of those events to cable. Thus, under the sound economic theory that currently underlies the antitrust law, such "migration" raises no competitive concerns.

D. A Number of Internal and External Factors Impact the Sports Programming Mix

Both the Cable Act and the Notice recognize the necessity of studying sports programming on a sport-by-sport basis.[9] The different internal and external factors impinging on each sport make a sport-by-sport methodology both appropriate and necessary. It is these internal and external factors that are responsible patterns within a given sport in different geographic markets. Below, Time Warner discusses the internal and external factors that affect the programming goals and strategies of the sellers of sports programming.

1. Internal Factors

Programming strategies of rights-holders are influenced by a number of factors which are internal to their particular sport, including: (1) organizational structure and revenue sharing arrangements; (2) labor demands and organization of the labor market; (3) frequency and timing of games played; and (4) seasonality of schedule.

The following discussion of the internal factors which affect the placement of sports programming is not meant to be either exhaustive or conclusive. It merely serves to illustrate that the Commission cannot adequately carry out the Congressional mandate to analyze existing sports programming trends and predict future ones[10] without examining the sports themselves and their internal organization.

[10] See Cable Act at § 26(b); House Report at 126.

a. Organizational Structures and Revenue Sharing Arrangements

Professional football and baseball have radically different organizational structures and revenue sharing arrangements.[11] The National Football League sells the programming rights to all of the League's games and divides television programming revenue equally among all of its teams. Major League Baseball operates in a different manner. Each baseball team is free to sell local rights to its own games subject only to limited restrictions[12] contained in national programming packages negotiated by Major League Baseball.

The NFL's arrangements serve to preserve competitive balance among the League's teams, but presumably deprive teams in demographically more attractive areas of the opportunity to garner additional revenue. The Major League Baseball structure produces the opposite effect. Differences in the size and demographics of the viewing markets of the professional baseball

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[11] Time Warner believes it appropriate that any detailed description of organizational structures and revenue sharing arrangements that the Commission might find useful be furnished by the respective sports leagues. Accordingly, its discussion of such structures and arrangements is of those features most salient to sports programming.

[12] See Sports Programming and Cable Television: Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 33 (1989)(hereinafter, "1989 Senate Hearing")("Our clubs have not, however, been limited to any significant degree by restrictions contained in national network contracts -- either past or future.") (testimony of Francis T. Vincent, Jr.) (emphasis in original).

teams are fully reflected in the teams' television distribution deals and, thus, baseball's broadcast-cable mix varies widely from locality to locality.

b. Labor Demands and the Organization of Labor Markets

While much of the debate about sports programming centers on the interaction of the commissioners, owners, broadcasters and cable programmers, the Commission should recognize that, ultimately, the players have a very significant impact. The labor markets in both professional baseball and football are undergoing dramatic change and will continue to do so well into the foreseeable future.

Free agency and salary arbitration in baseball and the advent of free agency in professional football have a fundamental impact on player salaries. To the extent these phenomena tend to drive up salaries, as appears to be the case, team owners will look to increase revenues to cover those increased costs. Naturally, owners will explore whether cable television as a means of supplementing their revenues.

c. Frequency and Timing of Games Played

Sports programming is still a scarce and coveted commodity, notwithstanding its explosive growth during the past decade. And it is the owners and the players that determine the amount and scheduling of the sports to be made available. These determinations have a very significant effect on sports programming patterns.

Baseball teams play 162 regular season games per year. In 1989 only three of the 26 major league ballclubs were able to place more than 75 games on local broadcast TV.[13] The Commissioner of Major League Baseball attributed this surplus of supply to "[n]etwork and syndicated programming commitments made by broadcasters."[14] But this assumes that the length of the season and the number of games made available for telecast are immutable; rather than in the control of the owners and the players.

Professional baseball, basketball and hockey are all characterized by lengthy regular seasons with each team playing several games per week. They present a very different sports programming landscape from that of professional football. Football involves comparatively few regular season games and only relatively few are played in prime time. As a result, broadcasters have sought and obtained rights to the overwhelming majority of NFL games.[15]

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[13] See 1989 Senate Hearing at 38-39.

[14] See 1989 Senate Hearing at 34.

[15] During the 1990 professional football season, 92% of the NFL's 224 regular season games were broadcast exclusively on ABC, CBS or NBC. See 1990 House Hearing at 27.

The NFL presently schedules all but a handful of its games on Sunday afternoons. By scheduling so many games simultaneously it forfeits viewership and programming revenue. In the late 1980's the NFL sold a limited package of games to ESPN. This is an example of the layering phenomenon discussed above. The NFL, in effect created another layer of games which it sold to cable. This also is a prime example of the concept of abandonment. ESPN acquired rights to the games only after ABC decided to drop Sunday and Thursday night games from its package and the other networks declined to pick them up. In describing the NFL's programming options for 1987-1989 Commissioner Pete Rozelle stated:

> Ultimately, no network made an attractive offer for the 'specials' games. As a CBS executive has publicly stated, 'the product going to cable was a product that the networks didn't, wouldn't, couldn't choose to carry. We had a chance to pick up those games and passed.' In the final analysis, we selected the ESPN proposal, because it was superior on all relevant criteria . . . .[16]

It is conceivable that the NFL will consider moving additional games from Sunday afternoon as it searches for revenue to cope with salary pressures occasioned by free agency and other economic factors.

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[16] See 1989 Senate Hearing at 57.

d. Seasonality of Schedule

Major sports programming is not equally distributed throughout the calendar year. Major League Baseball has the summer months all to its self. At the other extreme, professional and college football, professional and college basketball and professional hockey all share a common winter season. This bunching of sports during the winter months cannot help but affect the sports programming mix. It does so by exacerbating the scarcity of time slots which broadcasters make available for sports programming. The inevitable consequence of too many winter ballgames chasing too few broadcast television time slots is that certain sports (such as professional hockey) get shut out entirely and others are unable to sell as much programming to broadcasters as they would absent this seasonal competition from other sports.

2. External Factors

Sports leagues and teams do not operate in a vacuum. Like other businesses, their economic fortunes are significantly influenced by factors they do not control. These external factors in turn force changes in their programming goals and strategies and ultimately affect the sports programming mix. Three of the most salient external factors at work in this